IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1813

HANS BAUSSUS VON LUETZOW, *Petitioner-Appellant,*

v.

CLIFFORD ALEXANDER, SECRETARY OF THE ARMY, ET AL.,
*Respondents-Appellees.*

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FOURTH CIRCUIT

DR. HANS BAUSSUS VON LUETZOW
*Petitioner pro se*

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## SUBJECT INDEX

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No.

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HANS BAUSSUS VON LUETZOW, *Petitioner-Appellant,*

v.

CLIFFORD ALEXANDER, SECRETARY OF THE ARMY, ET AL.,
*Respondents-Appellees.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FOURTH CIRCUIT

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The Petitioner, Hans Baussus von Luetzow, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming a District Court (Petition for Rehearing denied March 28, 1978). The petitioner maintains that the court of appeals has sanctioned extreme departures of the lower court from the accepted and usual course of judicial proceedings, has not conducted a thorough review, and has rendered decisions in conflict with fact and law under avoidance of oral argument.

## OPINIONS BELOW

### Memorandum Opinion and Order of the District Court for the Eastern District of Virginia, Alexandria Division

The court denied petitioner's promotion and Inspector General testimony claims and part of his award denial claim and "all other claims not specifically mentioned" and dismissed the complaint on Feb. 9, 1977 following trial on May 6, 1976 and dismissal of the correlated declaratory judgment complaint without prejudice against seven individual defendants involved in the four trial issues on that day. The Memorandum Opinion and Order appears herein as Appendix A.

### Judgment of the Fourth Circuit Court of Appeals

The Appeals Court Affirmed without oral argument. Its unpublished judgment appears herein as Appendix B.

Petition for Rehearing Denied March 28, 1977—Appendix C.

## JURISDICTION

(i) The Judgment of the United States Court of Appeals for the Fourth Circuit was initially entered February 27, 1978.

(ii) The Rehearing was Denied March 28, 1978.

(iii) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the appeals court properly sanctioned extreme departures from the accepted and usual course of judicial proceedings.



Is the lower court's judgment concerning claims of perjurious and malicious, prima facie defamatory statements by Colonel Wagner without a specific hearing thereof, without a jury, without proposed witnesses, without regard to State law, without regard to total preponderance of petitioner's evidence, and under a claim restriction to false statements a sanctionable departure from the accepted and usual course of judicial proceedings, requiring reversal or retrial of the Inspector General testimony issue?

2. Whether petitioner as a registered career scientist was entitled to priority consideration for promotion because of prior nonconsideration and correlated preselection of the prior incumbent of the position in the light of applicable law.

3. Whether the appeals court invalidated the supplemental referral request provision of Army Civilian Personnel Regulation 950-1 of March 1971.

4. Whether the selecting official's stated preference for outside candidates and his stated and demonstrated unwillingness to use a supergrade for available GS-15 candidates violated provisions of law.

## STATUTES, COURT RULES AND REGULATIONS INVOLVED

1. 5 U.S.C. 3301—Civil Service Rules, § 9.4 Recruitment for Career Executive Assignments:

> (a) Before selecting any person for a Career Executive Assignment the appointing officer shall first consider fully employees under his agency's merit promotion program and available employees of other Federal agencies qualified pursuant to paragraph (b) of this section. Only after this consideration may the appointing officer elect to re-

cruit applicants from outside the Federal service pursuant to paragraph (b) of this section.

2. Code of Virginia, Article 4—Defamation

§ 8.01-45. Action for insulting words.—All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace. (Code 1950, § 8-630; 1977, c. 617.)

3. Code of Virginia, Article 4—Defamation

§ 8.01-46. Justification and mitigation of damages.—In any action for defamation, the defendant may justify by alleging and *proving* that the words spoken or written were true, and, after notice in writing of his intention to do so, given to the plaintiff at the time of, or for, pleading to such action, may give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so in case the action shall have been commenced before there was an opportunity of making or offering such apology. (Code 1950, § 8-631; 1977, c. 617.)

4. Fed. R. Civ. P. 39—Trial by Jury or by the Court:

(a) By Jury . . . The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered into the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.



5. Fed. R. Civ. P. 301—Presumptions in General in Civil Actions and Proceedings:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

6. Fed. R. Civ. P. 302—Applicability of State Law in Civil Actions and Proceedings:

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

7. Executive Order No. 11478:

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons . . . , and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

8. Federal Personnel Manual 335, Oct. 25, 1973, p. 18 3-9. General Requirements:

c. Procedural practices. Agencies should avoid practices that may lead employees to believe that a

person was preselected for a job filled under competitive promotion procedures or that a promotion was based on favoritism.

9. Federal Personnel Manual 335, Oct. 25, 1973, p. 19 4-1. Applicability of Competitive Promotion Procedures:

e. Selection for details. (1) A detail of more than 60 days to a higher-grade position or to a position with known promotion potential is made under competitive promotion procedures. This requirement is not to be circumvented by a series of temporary assignments. . . .

10. Federal Personnel Manual 335, Oct. 25, 1973, pp. 31-32 6-4. Corrective Actions

a. General (2) Types of promotion violations:

(a) *Procedural.* A procedural violation occurs when a promotion action does not conform to the requirements of the applicable promotion plan. It may include, for example:

(i) Failure to consider an employee entitled to consideration; . . . .

(b) *Regulatory.* A regulatory violation occurs when the promoted employee did not meet legal requirements or Commission regulatory requirements at the time of promotion. It may include, for example:

(i) Failure to meet time-in-grade requirements; or

(ii) Failure to meet Commission qualification requirements.

c. Action involving nonselected employees:

(2) If the corrective action did not include vacating the position, an employee who was not promoted or given proper consideration because of the violation is to be given priority consideration for the next appropriate vacancy before candidates under a new promotion or other placement action are considered. . . . .



11. Army Civilian Personnel Regulation 950-1, March 1971, p. 39 4-7i. Registration:

Employee registration on DA Form 2302 is prerequisite to referral eligibility within and outside the parent installation. It is a basic responsibility of the employee and serves as his primary avenue of written communication with those who will help guide and provide opportunities for his career development. The vehicle of registration is the employee's best initial opportunity to speak to management about his availability and qualification for career advancement. . . . .

12. Army Civilian Personnel Regulation 950-1, March 1971, p. 48 4-9c(2) Returning referral records:

. . . Supplemental referral action may be requested if the initial referral list fails to produce as many as three available candidates. . . . .

13. Army Civilian Personnel Regulation 950-1, March 1971, Appendix B, p. 4. Career Referral Record, Section C—Instructions to Requesting Activity:

2. In the absence of priority candidates, selection will be made from the Referral List, in Item 20.

## STATEMENT OF THE CASE

*Abbreviations*

"A" shall designate Appendix and "SAII" Special Appendix contained in petitioner's Reply Brief.

**Basis of Federal Jurisdiction in District Court**

The District Court had original jurisdiction under the Administrative Procedure Act, the Declaratory Judgment Act, and the Civil Rights Act.

**Judicial Proceedings in District Court**

The Court declared during trial that it would only hear and determine the promotion issue and questions of perjury or malice impacting thereon (A 100-101, 116-117). It did not specifically hear the career appraisal and award denial issues and the Inspector General testimony issue, i.e., if Colonel Wagner made malicious statements about petitioner which precluded full and fair consideration for promotion. In this respect, Colonel Wagner answered only marginal questions by his counsel, offered no witnesses, and submitted no evidence to rebut defamatory and presumed malicious statements. Commensurate with the court's decision to fully try only the promotion issue there was no trial by jury despite petitioner's jury demand, despite the absence of a withdrawal stipulation by the parties, and despite the court's deliberation as to questions of false statements and malice. Two witnesses proposed by petitioner were not heard. In its judgment, the court restricted petitioner's claims of perjurious and malicious statements to whether Colonel Wagner lied in his (sworn) Inspector General hearing (testimony). In accordance herewith and with trial without a jury, the judgment makes no reference to applicable State law. It makes further no reference to the total preponderance of petitioner's evidence (one comprehensive affidavit by petitioner, one affidavit by a proposed critical witness, one documentary exhibit).



**Facts Underlying Priority Consideration for Promotion**

Dr. O'Connor, prior incumbent of the GS-16 position of Director, Research Institute & Scientific Advisor, U.S. Army Engineer Topographic Laboratories (ETL), was preselected for and detailed to this position 13 months before his promotion to GS-16 in April 1971 (SAII, 18). Lieutenant Colonel Simcox, former Deputy Commander, ETL confirmed Dr. O'Connor's illegal detail (SAII, 30). Petitioner was already nominated for this position, then Scientific Advisor, in April 1965 because of his outstanding qualifications therefore (SAII, 25). In accordance with Dr. O'Connor's preselection and in order to eliminate competition by Army candidates, an Army-wide referral search was not conducted. Instead, selection was made from an Executive Inventory referral list of four candidates with Dr. O'Connor as the only ETL candidate (SAII, 20). In this way, petitioner as an Army-wide registered career scientist, whose qualifications for the GS-16 position were officially re-affirmed in April 1973, was eliminated from consideration.

**Facts Underlying Supplemental Referral Requests**

Colonel Wagner, ETL Commander and selecting official, considered three remaining candidates on the initial referral list following Dr. O'Connor's declination to return to ETL (A 38). He did not select one of these certified candidates because he did not consider them sufficiently qualified. The requested supplemental referral list contained petitioner as the only ETL candidate and three additional Army candidates two of whom declined. After consideration of petitioner and Dr. Sterrett as the fourth and fifth available, non-rejected candidates, Colonel Wagner requested a second supplemental referral list.

**Facts Underlying Preference for Outside Candidates and Unwillingness to Use Supergrade for Available GS-15 Candidates**

Colonel Wagner testified that he had tried for two years and had not attracted anybody from the educational and academic community and that among the candidates available to him at the GS-15 level it was not necessary to use a supergrade (A 87, para. 8). In accordance herewith, he initiated abolition of the GS-16 position following declination of Dr. Goldberg as an outside candidate selected from the second supplemental referral list. This list still contained petitioner and Dr. Sterrett as available, non-rejected candidates. Contrary to Brigadier General Podufaly's strong justification for a GS-16 position and a 2 year recruiting effort therefore, Colonel Wagner reconstituted the GS-16 position as a GS-15 position and filled it non-competitively with an employee unqualified for GS-16 certification.

## REASONS FOR ALLOWANCE OF THE WRIT

### *Abbreviations*

References to statutes, court rules and regulations cited above are indicated by "L" and the respective identification number.

### 1. Departure From the "Accepted and the Usual" and Sanction Thereof

In its judgment, the lower court disregarded that it wanted to hear and determine only the promotion issue and pertinent questions relating to perjury and malice and that the three non-promotion issues had not been explicitly tried in open court. Because of the concentration on the promotion issue, it also disregarded petitioner's demand for trial by jury and the necessity of



making findings as to false and malicious statements by a jury, contrary to *L4*. In conjunction herewith, it eliminated witnesses proposed by petitioner. It further changed petitioner's claim of false and malicious Inspector General testimony to whether Colonel Wagner lied therein, thus removing the applicability of State law (*L2* or common law) and of *L6*. According to State law, the burden of presumed malice, evident from identified prima facie defamatory statements, was on Colonel Wagner according to *L3* and Michie's Jurisprudence of Virginia and West Virginia, Vol. XII, 1950, p. 55:

"A presumption of malice may be rebutted by proof that no malice was intended. The belief of the defendant, when he made the charges, that they were true, and the existence of reasonable grounds for such belief are very material facts to disprove actual malice or rebut any inference of the existence of actual malice. There are but two ways in which the defendant may prove these facts: (1) by proving the existence of facts within his knowledge reasonably tending to produce such a belief, and (2) by proving that he received such information from others under such circumstances as reasonably induced him to believe that the charges were true."

The lower court disregarded that, under nonconsideration of applicable State law, Colonel Wagner failed to go forward with evidence according to *L5* and further disregarded petitioner's total preponderance of evidence. The court of appeals was informed about the above departures by petitioner's brief, p. 2-5, 11-12, 25-29, his Petition for Rehearing, p. 2, and the lower court's judgment. It sanctioned them by tacit approval,

by denying petitioner the opportunity to emphasize the identified departures by oral argument, and by denying the Petition for Rehearing.

**2. The Review is Not Thorough and Contains Decisions in Conflict with Fact and Law**

THE REVIEW LACKS THOROUGHNESS

In footnote 1 of its judgment, the court of appeals stated: "The district court found that actions taken by Col. Wagner and Lt. Col. Devereaux regarding appellant's 1971-72 career appraisal . . . were not malicious" and considered this determination as not clearly erroneous. In fact, Lieutenant Colonel Devereaux was not involved in the career appraisal issue and substituted for Appellant Richardson in this respect. The case against Appellant Richardson was dismissed without prejudice. In addition, facts and law involving the fourth question were not addressed. The cases cited are not of relevance herein and are not necessary to ascertain the grounds for the judgment.

PETITIONER CLEARLY ENTITLED TO PRIORITY CONSIDERATION FOR PROMOTION

Dr. O'Connor's recognized preselection was prohibited by *L8* and his illegal detail far beyond 60 days by *L9*. Failure to consider an available, qualified employee, preselection, and illegal detail are procedural and regulatory merit promotion violations (*L10a*). A prior nonconsidered employee is to be given priority consideration for the next appropriate vacancy (*L10c*). Petitioner as a prior interested, available, highly qualified and registered career scientist (1969) was, therefore, entitled to priority consideration for the vacant GS-16



position. The law requires registration for career referral eligibility and thus eliminates the need to become an "active candidate" (*L11*).

A REGULATORY PROVISION INVALIDATED

Based on *L12* and *L13*, a selecting official has to select a candidate from an initial referral list containing at least three available candidates. Accordingly, Colonel Wagner was not entitled to a supplemental referral list. Such list was provided as a favor and furnished Colonel Wagner two additional candidates including petitioner. Contrary hereto, the court of appeals permits a reduction of available candidates by nonselection: "In each instance that appellee Wagner asked for a new list, declination *or nonselections* had reduced the number of applicants below three" (emphasis added). Such reduction invalidates *L12* and would allow a selecting official to request an unlimited number of referral lists until his favorite is included. Colonel Wagner was, therefore, obligated to make a selection from the supplemental referral list with petitioner as a highly qualified and properly registered candidate.

PREFERENCE FOR OUTSIDE CANDIDATES AND DENIAL TO PROMCTE AVAILABLE GS-15 CANDIDATES UNLAWFUL

Colonel Wagner's expressed preference for outside candidates and his unwillingness to promote available GS-15 candidates, including petitioner as ETL's only highly qualified candidate, is incompatible with L1 and L7. His denial of equal opportunity is aggravated by the arbitrary and capricious reconstitution of the strongly justified GS-16 position at GS-15 and the noncompetitive filling thereof with a favorite. Simultane-

ously, Colonel Wagner acted in bad faith with respect to referred GS-15 candidates who believed that they received full and fair consideration for promotion.

**CONCLUSION**

For the foregoing reasons a Writ of Certiorari should be granted.

Respectfully submitted,

DR. HANS BAUSSUS VON LUETZOW
*Petitioner pro se*

Mailing Address:

8021 Garlot Drive
Annandale, VA 22003

# APPENDIX

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

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HANS BAUSSUS VON LUETZOW, *Plaintiff*

v.

MARTIN HOFFMAN, etc., et al., *Defendants*

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Civil Action No. 75-695-A

Filed February 9, 1977

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MEMORANDUM OPINION AND ORDER

Dr. Hans Von Luetzow brought this pro se action against the Secretary of the Army and the other named defendants, challenging his non-selection for promotion to the GS-16 supergrade position of Director, Research Institute and Scientific Advisor at the U.S. Army Engineers Topographic Laboratories at Fort Belvoir, Virginia.

He seeks a promotion to GS-16 and two years' back pay, and prays that this Court expunge his 1971-1972 career appraisal from the records and files of the Department of the Army and order that he be given, retroactively, the special award denied him in 1974.

He also seeks punitive damages against Col. Wagner and imposition of costs against all other defendants. (See Judge Bryan's pretrial order dated April 12, 1976.)

This case was heard on stipulations, depositions, exhibits and the live testimony of Dr. Von Luetzow and Col. Wagner.

Upon the conclusion of Dr. Von Luetzow's testimony, all of the defendants, except the Secretary of the Army, Col. Wagner and Lt. Col. Devereaux, were dismissed without prejudice—Dr. Von Luetzow seeks no monetary award from any of them and does not claim that any of them are personally responsible for his not getting the promotion in question—He only wants this Court to declare that these defendants said and did what he alleges they said and did in re his career appraisal and in the denial of his claimed special award.

It should be noted that the Army ordered a special review of Dr. Von Luetzow's complaints by the Army Staff and by a specially designed investigation by the Unted States Army civilian appellate review agency. Neither found any basis for any of the plaintiff's complaints.

It should also be noted that he brought an action in the United States District Court for the District of Columbia, Civil Action No. 75-1553, alleging that the Civil Service Commission arbitrarily refused to award him a supergrade classification at GS-16 and that various named Army officials have conspired to obscure, misrepresent and conceal his true qualifications from the Commission.

Judge Gesell thoroughly reviewed the administrative record and found that the procedures followed were fair and thorough, and granted summary judgment for the defendants—That decision can neither be relitigated or reviewed in this court.

Nevertheless this Court gave him the opportunity of stating what he wanted to say in the premises.

A review of his testimony discloses that he claims priority for the position sought because he was not considered originally for the position of director after Professor Bjerhammar left—Hesays a Dr. O'Connor was pre-selected and non-competitively promoted to the GS-16 position. He called this to the attention of Col. Wagner, the Commander of the Engineers Topographic Laboratories.



He next says that when the position became vacant again when Dr. O'Connor left, Col. Wagner started an essentially outside recruitment not under the Army merit program—He was not on the referral list—He did not apply because he thought Col. Wagner would grant his requested priority.

Col. Wagner, the appointing officer, rejected those on the referral list and requested a new list.

Four candidates, including Dr. Von Luetzow, were then referred to the colonel for consideration. Upon interview, two declined leaving Dr. Von Luetzow and another candidate as potential selectees—Col. Wagner refused to select from the remaining two and requested a third referral list.

Five were then referred to Col. Wagner, including Dr. Von Luetzow and a Dr. Harold Goldberg.

Dr. Von Luetzow claims, however, that the qualification requirements for the director's position were changed by Col. Wagner to tailor the position for Dr. Goldberg's qualifications, the outsider he wanted to select.

Dr. Von Luetzow complained to the Secretary of the Army, and the appointment was held up. Due to the long delay, Dr. Goldberg declined the position and accepted a job offer elsewhere.

In the interim, Col. Wagner requested approval of his superiors to abolish the GS-16 combined position of director and scientific advisor (which he had first suggested some two years previously) and to replace it with a GS-15 director and a GS-15 scientific advisor.

Dr. Von Luetzow claims Col. Wagner abolished the combined position because he was the only remaining candidate with both qualifications.

Col. Wagner's recommendations was approved by the appropriate Army officials, and the GS-15 incumbent asso-

ciate director was given the newly created GS-15 director position. When he retired the position was offered to Dr. Von Luetzow—He declined it.

When Dr. Von Luetzow was asked what Col. Wagner had done to entitle him to an award of punitive damages, he replied, "Col. Wagner deliberately denied me promotion to the GS-16 because he did not want to consider anybody who was available to him in ETL." He further said that the colonel had a personal dislike of him and that he participated in his 1971-72 career appraisal "in which I got a very bad, malicious appraisal for 1972"—and that the colonel went beyond his duties in doing so. He also said that Col. Wagner retroactively denied him a special action service award by issuing a policy change in ETL's awards policy —It was malicious because it only applied to him and nobody else.

Dr. Von Luetzow says that the remaining issue, by far the major issue as far as Col. Wagner is concerned, is his Inspector General testimony—He claims the colonel lied when giving his deposition.

The next individual that Dr. Von Luetzow complained about was Lt. Col. Devereaux who, he says, participated in the denial of the special service award by formulating another denial reason "which was later found to be illegal, untenable," and that he changed the award record by cutting off the original denial comment. He does not want any monetary damages from the lieutenant colonel—He just wants a technical determination by the Court that he did these things.

The Court has reviewed the voluminous Army review records in this case together with the numerous exhibits and extensive memoranda filed by both parties, and is satisfied that Dr. Von Luetzow was not entitled to a priority appointment and that Col. Wagner followed the established army and government regulations in seeking a replacement



for Dr. O'Connor upon his resignation as combined Director and Scientific Advisor of ETL.

The Court is further satisfied that Col. Wagner was within his rights in recommending the abolition of the combined GS-16 director and scientific advisor position and replacing it with a GS-15 director and a GS-15 scientific advisor—That recommendation was duly and properly approved by the appropriate Army officials.

The Court further finds that when Col. Wagner assumed command of ETL, the supergrade combined position of Director, Research Institute and Scientific Advisor was held by Dr. Desmond C. O'Connor—Therefore he was not responsible for his appointment as such.

Dr. Von Luetzow has failed to prove that he was entitled to the supergrade position of combined Director and Scientific Advisor of ETL on a priority basis or because he was the best qualified person in ETL.

He has also failed to prove that Col. Wagner acted improperly or contrary to law in attempting to select a replacement upon Dr. O'Connor's resignation or in recommending that the vacant combined GS-16 director and scientific advisor position be abolished.

His claims of malice on the part of Col. Wagner and Lt. Col. Devereaux in the premises and that Col. Wagner lied in giving his deposition used in the Inspector General hearing are lacking in sufficient evidentiary support.

These and all other claims not specifically mentioned herein are denied.

Therefore Dr. Von Luetzow's complaint must be dismissed, and

It Is So Ordered.

The Clerk will send a copy of this memorandum opinion and order to Dr. Von Luetzow and to counsel of record for the defendants.

/s/ OREN R. LEWIS
United States Senior District Judge

February 9, 1977

A True Copy, Teste:
W. Farley Powers, Jr., Clerk

By /s/ W. FARLEY POWERS, JR.
Deputy Clerk



## APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 77-1789

---

HANS BAUSSUS VON LUETZOW, *Appellant*,

v.

CLIFFORD ALEXANDER, SECRETARY OF THE ARMY, COL. JOHN WAGNER, LT. COL. GEORGE SIMCOX, LT. COL. ALFRED DEVEREAUX, LT. COL. LESLIE WIEDUWILT, JOHN RICHARDSON, BELA BODNAR, MICHAEL GASDO, DONALD HANDBERG, T. W. HATHAWAY, *Appellees*.

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Filed February 27, 1978

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UNPUBLISHED

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

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Submitted: January 26, 1978

Decided: February 27, 1978

Before WINTER, BUTZNER and RUSSELL, Circuit Judges.

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(Hans Baussus Von Luetzow, Appellant Pro Se. Capt. Reed L. von Maur, Counsel, Department of the Army; Elsie M. Powell, Assistant United States Attorney, for the Appellees.)

PER CURIAM:

Dr. Hans Baussus von Luetzow appeals pro se a district court judgment dismissing his complaint challenging his non-selection for a GS-16 combined position of Scientific Advisor and Director, Research Institute, Engineer Topographic Laboratories, Fort Belvoir, Virginia. The district court found that appellant failed to prove that he deserved the supergrade position on a priority basis when vacated by the incumbent. Additionally, the court found that appellee Wagner, former commander of the laboratories, followed appropriate Civil Service Commission and Army regulations while seeking a successor for the former director. Dr. von Luetzow claims the court overlooked critical testimony and documentary evidence regarding several aspects of his complaint and misapplied pertinent regulations. Finding no merit to appellant's contentions, we affirm the judgment below.[1]

Appellant claims that Federal Personnel Manual (FPM), Chapter 335, 6-4(c)(2)[2] entitled him to priority consideration for the vacancy because of the pre-selection and non-competitive appointment of the former incumbent, Dr. O'Connor. Appellant further argues that procedural irregularities in the selection process disqualified other candidates from consideration. He contends that his priority status and the elimination of these other candidates dictated his selection as the only legally eligible prospect.

[1] The district court found that actions taken by Col. Wagner and Lt. Col. Deveraux regarding appellant's 1971-72 career appraisal and the denial of a special service award were not malicious. The court further found that Col. Wagner did not lie during his deposition and Inspector General testimony. We cannot say that these determinations are clearly erroneous. Rule 52(a), R.F. Civ. P.

[2] FPM 335, 6-4(c)(2) (Sept. 20, 1968), provides:

> (2) If the corrective action did not include vacating the position, an employee who was not promoted or given proper consideration because of the violation is to be given priority consideration for the next appropriate vacancy before candidates under a new promotion or other placement action are considered. . . .

The term violation includes any procedural, regulatory, or program violation described in Section 6-4(a)(2).



Section 6-4(c)(2) requires priority consideration of an employee for the next appropriate vacancy when a promotion violation has prevented his proper consideration or promotion. While appellant points to documentary evidence consistent with the pre-selection of Dr. O'Connor, we cannot say that the district court's finding in this regard is clearly erroneous. Rule 52(a), F.R. Civ. P. Moreover, appellant has not shown that he was an active candidate whose consideration was foreclosed by Dr. O'Connor's alleged pre-selection. Dr. von Luetzow therefore was entitled only to whatever consideration his qualifications indicated.

Appellant also contends that Col. Wagner used supplemental referral lists during the selection process contrary to law.[3] Army Civilian Personnel Regulation (CPR) 950-1.4-9(c)(2),[4] however, permits a request for supplemental referral action if the initial request failed to produce at least three available candidates. In each instance that appellee Wagner asked for a new list, declinations or non-selections had reduced the number of applicants below three.

Appellant's complaint that Col. Wagner used lists including prospects outside the government does not withstand scrutiny in light of CPR 300, Ch. 10, 305.3-4(c)(2)(b)[5] which recognizes that an outside search may proceed at the same time as an in-house recruiting effort.

[3] In fact, Dr. von Luetzow's name appeared on two supplemental referral lists.

[4] March 19, 1971.

[5] April 21, 1969.

In sum, we find no violation of any regulation or arbitrary and capricious action, *Halsey v. Nitze,* 390 F.2d 142, 144 (4th Cir. 1968); *cf. McEarchern v. United States,* 321 F.2d 31, 33 (4th Cir. 1963). We therefore affirm the judgment of the district court.[*]

AFFIRMED.

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[*] Because administrative officials' discretionary decisions concerning personnel actions are outside the scope of our review, *cf. Urbina* v. *United States,* 428 F.2d 1280, 1284 (Ct. Cl. 1970), we do not consider appellant's argument regarding comparative employment discrimination.



## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 77-1789

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Filed March 28, 1978

[Title omitted in printing]

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ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Butzner, and Judge Russell.

For the Court,

/s/ WILLIAM K. SLATE, II
*Clerk*

A True Copy, Teste:
William K. Slate, II, Clerk

By Emily Kueger

No. 77-1813



# In the Supreme Court of the United States

OCTOBER TERM, 1978

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HANS BAUSSUS von LUETZOW, PETITIONER

*v.*

CLIFFORD ALEXANDER, SECRETARY OF THE ARMY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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WADE H. McCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 77-1813

HANS BAUSSUS von LUETZOW, PETITIONER

*v.*

CLIFFORD ALEXANDER, SECRETARY OF THE ARMY, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

---

**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

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Petitioner seeks review of the dismissal of his action challenging his non-selection for promotion to a GS-16 position as Director and Scientific Advisor of an Army research facility at Fort Belvoir, Virginia.

Petitioner's complaint alleged first that the previous incumbent in the position had been appointed non-competitively, in violation of applicable promotion regulations. Petitioner asserted that as a consequence he was entitled to priority consideration for the vacancy under the relevant Federal Personnel Manual provision.[1] Petitioner also alleged that the commanding officer of the research facility adjusted the qualification requirements

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[1]Federal Personnel Manual 335, 6-4(c)(2) (Pet. App. 8a-9a and n. 2).

for the Director's position and otherwise manipulated the lists of candidates to avoid appointing petitioner. Finally, petitioner maintained that the commanding officer made false, malicious, and damaging statements in petitioner's career appraisal for 1971-1972. Petitioner sought, *inter alia*, promotion, back pay, and punitive damages against the commanding officer.

Following a trial the district court ruled that petitioner failed to prove that he was entitled to the GS-16 position on a priority basis or because he was the best qualified candidate (Pet. App. 5a). The court also found that petitioner presented insufficient evidence to support his claim of improper personnel practices or of malice or false statements by the selecting officer (*ibid.*). The court therefore dismissed petitioner's complaint. The court of appeals affirmed (Pet. App. 7a-10a). Accepting the district court's factual determinations, the court found no arbitrary and capricious action and no violation of any regulation by respondents (Pet. App. 9a-10a).

The decision of the court of appeals is correct and further review is not warranted. The district court found that petitioner failed to prove the critical allegations of his complaint. He did not show that he had been denied a promotion to which he was entitled or that he had been the victim of malicious falsehoods. The court of appeals affirmed these findings. Under this Court's well-settled rule, when two courts have reached the same conclusion on a question of fact, their findings should be accepted as final "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275. No such showing has been made by petitioner.[2]

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[2]Petitioner also asserts that he should have received a jury trial (Pet. 10-11). It has long been settled, however, that there is no right to a jury in actions against the government. *McElrath* v. *United States*, 102 U.S. 426.



It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
*Solicitor General.*

AUGUST 1978.

DOJ-1978-08

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1813

HANS BAUSSUS VON LUETZOW, *Petitioner,*

v.

CLIFFORD ALEXANDER, SECRETARY OF THE ARMY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## REPLY BRIEF TO MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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## REPLY BRIEF TO MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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### Petitioner Asserts Right to Jury Trial as to Colonel Wagner's Inspector General Testimony

Petitioner asserts the right to jury trial as to alleged perjurious and malicious, prima facie defamatory statements by Colonel Wagner in his Inspector General testimony (Pet. 3, paragr. 1). Petitioner's claim in this respect is, therefore, not an action against the United States in the context of 28 U.S.C. 2402 or *McElrath* v. *United States,* 102 U.S. 426.

**Petitioner's Reasons for Allowance of Writ Involve Questions of Law and Obvious and Exceptional Showing of Error**

1. Petitioner's entitlement to priority consideration for promotion (Pet. 12) is fortified by the respective findings of the lower court and of the appeals court:

> "The Court further finds that when Col. Wagner assumed command of ETL, the supergrade combined position of Director, Research Institute and Scientific Advisor was held by Dr. Desmond C. O'Connor—Therefore he was not responsible for his appointment as such." (Pet. App. 5a).
>
> "While appellant points to documentary evidence consistent with the pre-selection of Dr. O'Connor, we cannot say that the district court's finding in this regard is clearly erroneous. Rule 52(a), F.R. Civ. P." (Pet. App. 9a, paragr. 2).

Accordingly, the lower court made no direct finding as to Dr. O'Connor's preselective appointment and failed to hold the Secretary of the Army responsible herefore and for petitioner's correlated prior nonconsideration, while the appeals court acknowledged preselection of Dr. O'Connor. Prior nonconsideration of petitioner as a qualified candidate was a sufficient reason for priority consideration, and petitioner's right hereto was enhanced by Dr. O'Connor's preselection (Pet. 6-7, number 10).

2. The appeals court's invalidation of a significant regulatory provision (Pet. 13) reduces merit promotion to a fully discretionary action incomplete with due process and the equal protection of the laws under the Federal Constitution.

3. Colonel Wagner's pronounced preference for outside candidates and his demonstrated unwillingness to promote available GS-15 candidates, including petitioner as ETL's only fully qualified candidate (Pet. 10, 13), was neither addressed by the lower court nor by the appeals court. Petitioner contends that Colonel Wagner violated in this respect also the constitutional provisions of due process and the equal protection of the laws.



It is therefore respectfully submitted that the petition for a writ of certiorari * should be granted.

DR. HANS BAUSSUS VON LUETZOW
*Petitioner pro se*

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* Corrigenda to the petition are the following:
"March 28, 1977" on page 2 (middle) should read "March 28, 1978"; "does shift" on page 5 (number 5) should read "does not shift."